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IN THE

Supreme Court of the United States

TALK AMERICA, INCORPORATED,

Petitioner,

v.

JOE DOUGLAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Ninth Circuit err when it granted a writ of mandamus and ruled as a matter of law that an existing customer was not bound by a telephone service company's adhesive consumer contract which required individual arbitration, given that this contract was never provided to the existing customer but, rather, was merely posted on the company's website?

II. Did the Ninth Circuit err when it granted a writ of mandamus and ruled as a matter of law that New York law and policy regarding procedural unconscionability (which entirely eliminate the procedural unconscionability defense if a consumer has a choice of alternative service providers) fundamentally conflict with California law and policy regarding procedural unconscionability (which reject the notion that the availability of substitute services necessarily precludes a procedural unconscionability defense)?

III. Did the Ninth Circuit err when it granted a writ of mandamus and ruled as a matter of law that New York law and policy regarding substantive unconscionability (which consider the class action device to be a mere consolidation procedure that may be waived via a contract of adhesion) fundamentally conflict with California law and policy regarding substantive unconscionability (which embrace the class action device as a necessary tool for consumers with small value claims to vindicate their substantive legal rights collectively)?

IV. Did the Ninth Circuit err when it granted a writ of mandamus and ruled as a matter of law that a proposed class representative's stake in the case and controversy would be rendered moot if, before his case reaches the class certification stage, he is awarded his full measure of damages in a compulsory individual arbitration proceeding?

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INTRODUCTION

The law in California is settled on the three issues which underlie Talk America Inc.'s ("Talk America") petition for writ of certiorari ("Talk America's Petition" or "Petition"). First, a consumer cannot be bound by a contract that he/she has never seen or agreed to.[1] Second, a corporation cannot cherry-pick the state law that will govern a dispute with its customers and unilaterally impose its selection on its customers.[2] Third, a class action waiver provision embedded in an adhesive contract that effectively exempts the party with superior bargaining power "from responsibility for [its] own fraud, or willful injury to the person or property of another" cannot be enforced because it violates fundamental California law and public policy.[3]

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[1] *See, e.g., Los Angeles Inv. Co v. Home Sav. Bank*, 180 Cal. 601, 612-613 (Cal. 1919); *Cory v. Golden State Bank*, 95 Cal.App.3d 360, 364-366 (Cal.Ct.App. 1979); *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, 89 Cal.App.4th 1042, 1049-1050 (Cal.Ct.App. 2001).

[2] The proponent of a choice-of-law clause must demonstrate either: (1) that "the chosen state has a substantial relationship to the parties or their transaction;" or (2) that "a reasonable basis otherwise exists for the choice of law." *Washington Mut. Bank v. Super. Ct.*, 24 Cal.4th 906, 917 (Cal. 2001) (citation omitted). However, even if one of these tests is satisfied, a court cannot enforce a choice-of-law provision if the opponent of the clause establishes that "the chosen law is contrary to a fundamental policy of California." *Id.* at 917 (citation omitted).

[3] *Discover Bank v Super. Ct.*, 36 Cal.4th 148, 163 (Cal. 2005) (citing Cal. Civ. Code § 1668); *see also Shroyer v. New Cingular*

(Cont'd)

The United States District Court for the Central District of California ruled in a manner contrary to settled California law on all three of these issues. First, the district court held as a matter of law that posting the terms and conditions of a telephone service agreement on a website, without any notice to consumers, is sufficient to establish a consumer's agreement to those terms and conditions. (App. 17, 20.)[4] Second, the district court held as a matter of law that Talk America—a Pennsylvania corporation—could enforce its New York choice-of-law clause against a customer from California. (App. 21-22.) Third, although New York courts "have consistently held that [class action waiver provisions] are not unconscionable and do not violate public policy," the district court held as a matter of law that New York law on the unconscionability of class action waivers does not fundamentally conflict with California law and policy thereon. (App. 24.)

In sum, the Ninth Circuit invoked its mandamus power because the district court's three significant errors of law created an "exceptional" and "extraordinary" circumstance. (App. 6.) *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654 (9th Cir. 1977) (citations omitted). Therefore, because the Ninth Circuit applied

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Wireless Services, Inc., 498 F.3d 976, 982-983 (9th Cir. 2007) (finding that, under certain circumstances, class action waivers in adhesive consumer contracts are unconscionable and, thus, unenforceable under California law).

[4] As used herein, "App." refers to the materials included in the Appendix to Talk America's Petition, pursuant to Rule 24.5 of the Rules of the Supreme Court of the United States.

longstanding, generally applicable California law to remedy the district court's erroneous order compelling individual arbitration under the online version of Talk America's September 2005 consumer services agreement ("2005 CSA"), respondent Joe Douglas ("Douglas") respectfully requests that this Court deny Talk America's Petition in its entirety.

STATEMENT OF THE CASE

In 1998, Douglas "contracted with America Online ["AOL"] for long distance telephone services" at a flat rate without additional nongovernmental fees. (App. 15; ER0121 [Decl. of Joe Douglas].)[5] In or around 2001, Talk America "took over AOL's long distance accounts." (App. 15.)

In 2005, more than seven years after he originally contracted with AOL for long distance telephone services, Douglas terminated his account after he discovered that Talk America had added a variety of extra and unauthorized nongovernmental fees to his monthly telephone bill. (App. 15-16; ER0121 [Decl. of Joe Douglas].) Subsequently, Douglas filed a class action lawsuit against Talk America, wherein he alleged that Talk America routinely imposed undisclosed or inadequately disclosed nongovernmental surcharges on consumers' monthly long distance bills in direct violation of federal law, California state law, and common law. (App. 16; ER0002 [First Amended Complaint].)

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[5] Douglas cites to the certified record (Excerpts of Record or "ER"), pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States.

Talk America filed a motion to compel arbitration and stay litigation at the district court. In its motion, Talk America sought to enforce against Douglas the following provisions contained in a 2005 online version of its CSA: (1) a mandatory arbitration clause; (2) a class action waiver provision; and (3) a New York choice-of-law clause.

The district court found that Douglas never received written notice of the 2005 CSA's terms and conditions—*i.e.*, "the agreement containing [Talk America's] arbitration clause," class action waiver, and choice-of-law clause. (App. 17.) In fact, Douglas did not see Talk America's 2005 CSA until after he initiated the underlying lawsuit.[6] (ER0121 [Decl. of Joe Douglas].) Nevertheless, the district court decided that Douglas was bound by the 2005 CSA's arbitration clause because "Talk America provided [I]nternet access to the CSA, which [Douglas] could have read had he wanted to know the terms and conditions under which he was receiving services." (App. 20.)

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[6] In its Petition, Talk America inaccurately implies that Douglas knew the 2005 CSA existed, but that he simply chose not to review the terms and conditions that Talk America now seeks to enforce against him. (*See* Talk America's Petition at 9.) However, Douglas was unaware of the existence of the 2005 CSA. Thus, Douglas had no reason to visit Talk America's website and engage in a cumbersome analysis of Talk America's online 2005 CSA because, as the district court conclusively determined, Talk America never provided Douglas with notice regarding the terms and conditions of its 2005 CSA which are at issue in this case. (App. 17.)

As required by California's choice-of-law precedent, the district court compared New York's and California's respective "fundamental policies" involving "arbitration agreements, unconscionability, and class action waiver provisions." (App. 22.) The district court held that Talk America's New York choice-of-law clause governed the dispute. The district court reasoned that "New York law does not conflict with California's fundamental policy regarding arbitration agreements and class action waiver provisions" because: (1) in both states, "unconscionability requires a showing that the contract was both procedurally and substantively unconscionable when made;" and (2) although class action waivers can be unconscionable in California, there is no blanket policy in California against such waivers.[7] (App. 23-24.)

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[7] While the district court correctly concluded that California does not have a "blanket policy against class action waivers in the consumer context" (App. 24 (citation omitted)), the district court entirely glossed over what the California Supreme Court *did* in fact hold in *Discover Bank*:

> [b]ut when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." *Under these*

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On October 25, 2006, based on the foregoing findings, the district court entered its order granting Talk America's motion to compel individual arbitration and stay the litigation.

Douglas could not immediately appeal the district court's decision, given that an order compelling individual arbitration and staying the litigation is not an immediately appealable order. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 85 n. 2 (2000); 9 U.S.C. § 16(b). Therefore, in order to prevent the harm that would befall him if he were forced to individually arbitrate his small value claims pursuant to an arbitration clause containing an unconscionable class action waiver provision and a New York choice-of-law clause (neither of which he had ever seen or agreed to), Douglas filed a petition for a writ of mandamus with the Ninth Circuit under the All Writs Act. (App. 2.) *See* 28 U.S.C. § 1651.

The Ninth Circuit utilized its five factor balancing test, often referred to as "the *Bauman* factors," to evaluate Douglas' petition for extraordinary relief. *Bauman*, 557 F.2d at 654. Applying this test, the Ninth Circuit granted Douglas' request for mandamus because four of the five *Bauman* factors weighed heavily in favor of issuing the writ. (App. 3, 9-11.)

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> *circumstances, such waivers are unconscionable under California law and should not be enforced.*

Discover Bank, 36 Cal.4th at 162-163 (emphasis added) (citing Cal. Civ. Code § 1668).

Most importantly, the Ninth Circuit found that the third factor—which is a "necessary condition for granting a writ of mandamus" in the Ninth Circuit—was satisfied because "the district court [had] committed [three] clear errors of law." (App. 6, 9.) The district court committed its *first clear error* when it held that Talk America could enforce the arbitration clause, the class action waiver provision, and the choice-of-law clause in its 2005 CSA against Douglas, even though Talk America had never alerted Douglas to the existence of the pertinent terms and conditions of the 2005 CSA. (App. 6 (emphasis added).) "Th[is] error reflects fundamental misapplications of contract law and goes to the heart of [Douglas'] claim." (App. 6.) The Ninth Circuit further found that the district court committed "*two additional errors*" (App. 6 (emphasis added)) in its choice-of-law analysis because the district court misstated and misapplied "California law as to both procedural and substantive unconscionability." (App. 7; *see also* App. 6-7 n. 2.)

According to the Ninth Circuit, the first and second *Bauman* factors also weighed strongly in favor of granting mandamus. In particular, the Ninth Circuit concluded that, if an arbitrator awarded Douglas "all the damages he asks for," the resulting mootness of Douglas' "personal stake in the controversy" would prejudice Douglas "in a way not correctable on appeal"—namely, because Douglas would be unable to continue as a class representative and because he would be unable to appeal the district court's underlying order compelling individual arbitration. (App. 9-10.)

Lastly, the Ninth Circuit found that the fifth *Bauman* factor favored mandamus relief because the district court's order enforcing contractual terms "when a customer is only given notice of the terms by having the contract posted on the [I]nternet 'raises new and important problems' and 'addresses issues of law of first impression.'" (App. 10-11 (citing *Bauman*, 557 F.2d at 655).) As the Ninth Circuit concluded, even if Douglas had visited Talk America's website, he had "no reason to look" at the online 2005 CSA because he never received notice about this CSA from Talk America. (App. 4.) Thus, the Ninth Circuit found that the issue "deserves immediate resolution" because the district court's erroneous holding—which eviscerated longstanding, generally applicable contract principles of notice and assent, and distorted California unconscionability law—could potentially adversely affect "the relationship of numerous service providers with millions of customers." (App. 11.)

REASONS FOR DENYING THE PETITION

The proper resolution of Talk America's Petition does not turn, as Talk America claims, on inapplicable issues such as: the Ninth Circuit's so-called "special" standard of review for mandamus petitions involving arbitration agreements (Talk America's Petition at 3-4); the Best Evidence Rule; California's and the Ninth Circuit's supposed "antagonism toward arbitration" (Talk America's Petition at 2); and/or appellate fact-finding. (*See, e.g.*, Talk America's Petition at 3-8.) Rather, at its heart, Talk America's Petition hinges upon the proper application of deeply-rooted and universally

applicable contract law—including notice, acceptance, and unconscionability—as well as basic mootness principles.

I. THE NINTH CIRCUIT'S STANDARD FOR GRANTING MANDAMUS RELIEF MIRRORS THE STANDARD USED BY OTHER COURTS

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 16(b) does not authorize interlocutory appeals where a district court grants a motion to compel arbitration and stay the litigation. However, the Ninth Circuit's grant of mandamus did not "contraven[e]" 9 U.S.C. § 16(b)'s Congressional "directive," as Talk America contends, because the Ninth Circuit exercised its mandamus authority under a completely separate statute—the All Writs Act, 28 U.S.C. § 1651. (Talk America's Petition at 3.)

In the All Writs Act, Congress explicitly provides the courts of its creation with the power to "issue all writs" which are "necessary or appropriate." Given the drastic nature of the remedy of mandamus under the All Writs Act, the Ninth Circuit developed the five *Bauman* factors to "cabin [its] power to grant this writ." (App. 2 (citing *Bauman*, 557 F.2d at 654-655).) The *Bauman* factors are derived from this Court's and the Ninth Circuit's precedent dealing with mandamus. *Bauman*, 557 F.2d at 654 ("From those cases [dealing with mandamus] we have identified five specific guidelines.")

In its Petition, Talk America contends that the Ninth Circuit's *Bauman* factors conflict with the standards

utilized by other courts of appeal when evaluating orders compelling arbitration. (Talk America's Petition at 4.) However, even a cursory comparison of *Bauman* with the two cases cited by Talk America debunks this assertion. Like the Second Circuit, the Ninth Circuit's "touchstones of review by mandamus" include the improper judicial usurpation of power, an abuse of discretion, and the presence of significant issues of first impression. *Steele v. L.F. Rothschild & Co., Inc.*, 864 F.2d 1, 4 (2d Cir. 1988); *Bauman*, 557 F.2d at 654-655. Similarly, the Fifth Circuit and the Ninth Circuit both agree that mandamus is available where the district court has ordered arbitration if the mandamus petitioner demonstrates that his/her right to issuance of the writ is "clear and indisputable." *McDermott Int'l Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 748 (5th Cir. 1993); *Bauman*, 557 F.2d at 656.

Talk America further misconstrues *Steele* and *McDermott Int'l Inc.* when it cites these cases for the proposition that other courts of appeal "hold an alleged misapplication of state law generally must be addressed by direct appeal" and that "[an alleged misapplication of state law] is an insufficient basis for granting extraordinary relief by mandamus." (Talk America's Petition at 4.) Indeed, the Second Circuit in *Steele* refused mandamus because it determined that the district court in that case had acted within its power *and*—quite unlike the district court in this case—"*ha[d] applied well-settled principles of law* in reaching its decision" ordering arbitration. *Steele*, 864 F.2d at 4 (emphasis added). Likewise, the Fifth Circuit in *McDermott* acknowledged that "[mandamus] review may be available" to the petitioner, but it ultimately

denied the petitioner's mandamus request because the *petitioner failed to demonstrate a "clear and indisputable" right* to mandamus. *McDermott Int'l Inc.*, 981 F.2d at 748 (emphasis added).

In sum, the Ninth Circuit acted in accordance with this Court's precedent and the precedent of other circuit courts of appeal when it applied the *Bauman* factors and "conclude[d] that the balance of factors favor[ed] issuing the writ." (App. 11.)

II. THE NINTH CIRCUIT'S OPINION AND ORDER CONFORM WITH GENERALLY APPLICABLE CONTRACT LAW

Talk America contends that the Ninth Circuit improperly accorded "special treatment" to the arbitration agreement contained in Talk America's 2005 CSA. (*See, e.g.*, Talk America's Petition at 4-6, 10-11.) On the contrary, the Ninth Circuit simply evaluated the district court's conclusions of law according to contract principles which apply to any contractual provision, regardless of whether the provision at issue involves arbitration.

A. Douglas Was Not Required To Produce A Different CSA Because The Best Evidence Rule Does Not Apply

Federal Rule of Evidence 1002, also known as the "Best Evidence Rule," instructs that "[t]o prove the content of a writing ... the original writing ... is required, except as otherwise provided." Simply stated, the Ninth Circuit did not "abandon" the Best Evidence

Rule or create an exception to the Best Evidence Rule for arbitration agreements (*see* Talk America's Petition at 11) because the Best Evidence Rule had no bearing on its inquiry. Douglas was not seeking to prove—and the Ninth Circuit's ruling did not enforce—the terms and conditions of any particular CSA that existed before Talk America's 2005 CSA. *See* Advisory Committee Notes to Fed.R.Evid. 1002 ("Application of the [Best Evidence Rule] requires a resolution of the question whether contents are sought to be proved.") Instead, Douglas' petition for writ of mandamus and the Ninth Circuit's Order centered on: (1) the district court's erroneous conclusion of law that Talk America satisfied notice requirements by posting the 2005 CSA's arbitration clause, class action waiver provision, and New York choice-of-law clause online (App. 6-9); (2) the district court's erroneous conclusion of law that Talk America satisfied mutual assent requirements by posting the 2005 CSA's arbitration clause, class action waiver provision, and New York choice-of-law clause online (App. 6-9); (3) the district court's erroneous analysis of "California law as to both procedural and substantive unconscionability" (App. 7); and (4) the incurable prejudice that Douglas would experience as a class representative when his substantive claims became moot as a result of the district court's erroneous order compelling individual arbitration of his claims (App. 9).

Similarly, a court does not necessarily comply with the Best Evidence Rule—or, more importantly, generally applicable contract law principles—by "evaluat[ing] the only 'written' contract before it." (Talk America's Petition at 10-11.) A contract's terms and conditions are

not rendered enforceable simply because one party produces the contract to the court (or, for that matter, simply because that party posts those terms and conditions online).

1. Talk America—Not Douglas—Bore the Initial Burden of Proving that the 2005 CSA's Arbitration Clause Constituted an Enforceable Agreement

Talk America asserts that Douglas was required to produce a different CSA because he opposed Talk America's attempt to compel individual arbitration under the 2005 CSA. (*See* Talk America's Petition at 10.) In fact, Talk America contends that Douglas bore the evidentiary burden of "justifying a departure from [the 2005 CSA's] written terms." (*Id.*) However, Talk America misstates the law on this issue.

As this Court has directed, the threshold inquiry is whether a binding arbitration agreement exists according to state law contract principles (*e.g.*, contract formation, revocation, and enforceability). *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Lopez v. Charles Schwab & Co., Inc.*, 118 Cal.App.4th 1224, 1229 (Cal.Ct.App. 2004). Under California law, this means that Talk America—the proponent of the 2005 CSA's arbitration clause—bore the burden of proving the arbitration agreement's validity. [8] *See* Cal. Civ. Code § 1550; *see also Engalla v.*

[8] California law applies because Talk America's New York choice-of-law clause was not part of the parties' agreement and (Cont'd)

Permanente Medical Group, Inc., 15 Cal.4th 951, 972 (Cal. 1997) (a party that seeks to enforce an agreement to arbitrate bears the burden of proving that such an agreement exists).

In other words, Talk America was not required to "prove an absence of unconscionability" (*compare* Talk America's Petition at i), but instead was required to prove that the 2005 CSA's arbitration clause constituted an enforceable agreement under generally applicable California contract law. *First Options of Chicago, Inc.*, 514 U.S. at 944; *Engalla*, 15 Cal.4th at 972. Notably, although Talk America attempts to portray Douglas as a "sophisticated sports agent" who has engaged "in negotiations with companies such as Coca-Cola," Douglas' professional background does not alter or otherwise diminish Talk America's basic responsibility to establish that Douglas—who originally contracted for long distance services with AOL in 1998—received notice of and actually agreed to the 2005 CSA's arbitration clause.[9] (Talk America's Petition at 8.) Therefore,

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(Cont'd)
because California's choice-of-law analysis rendered it invalid. (App. 6-7 n. 2; *see generally* App 3-9.) *See Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001) (when a federal court sits in diversity jurisdiction, the law of the forum state controls the court's choice-of-law determination). Yet, even assuming *arguendo* that New York law applied, Talk America would still bear the burden of proving that Douglas was bound by the 2005 CSA's arbitration clause. *Samsun Corp. v. Khozestan Mashine Kar Co.*, 926 F.Supp. 436, 439 (S.D.N.Y. 1996).

[9] Furthermore, even if Douglas represented 'famous sports figures, including Olympian Carl Lewis, in negotiations with
(Cont'd)

because merely posting the arbitration clause contained in its 2005 CSA on the Internet is not sufficient to demonstrate that the terms and conditions of the 2005 CSA are part of the parties' contract as a matter of law, the Ninth Circuit held that Talk America failed to meet its burden. (App. 3-6.)

Moreover, even if Talk America had proven the arbitration clause in its 2005 CSA to be enforceable (which it clearly did not) and the burden had shifted to Douglas to "justify [] a departure" from the 2005 CSA's arbitration clause, Douglas would not have been required to produce a different CSA to refute the 2005 CSA's terms and conditions. Rather, Section 2 of the FAA provides that generally applicable state law contract defenses, such as lack of formation, fraud, duress or unconscionability, may be applied to invalidate arbitration agreements. *Ticknor*, 265 F.3d at 937 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996)).

In sum, because the Ninth Circuit's inquiry rested on whether the 2005 CSA's arbitration clause constituted a binding agreement to arbitrate under universally applicable contract principles, the Best Evidence Rule did not apply and Douglas was not obligated to produce or substantiate a different CSA.

(Cont'd)
companies such as Coca-Cola," Talk America does not assert that the 2005 CSA's terms and condition were open for negotiation by Douglas or any other customer. (Talk America's Petition at 8.)

B. Before Ordering The Parties To Arbitration, A Court Must Find That The Parties Agreed To Arbitrate

In its Petition, Talk America maintains that the Ninth Circuit "created a new standard and new timetable" for determining arbitrability. (Talk America's Petition at 11.) However, an analysis of this Court's precedent and the Ninth Circuit's Order granting mandamus reveals the falsity of Talk America's position.

1. The Ninth Circuit Analyzed Talk America's Arbitration Agreement Under the Correct Standards

According to Talk America, so long as the party seeking arbitration produces a contract containing an arbitration clause to the court, the dispute becomes "arbitrable" and must be moved "into arbitration as quickly and easily as possible." (Talk America's Petition at 12 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)).) However, before a court can compel arbitration, it must be "satisfied that the making of the agreement for arbitration . . . is not in issue." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 23 n. 27 (quoting 9 U.S.C. § 4). Otherwise stated, "whether or not [Douglas] was bound to arbitrate" is "a matter to be determined by the Court on the basis of the contract entered into by the parties" because the "duty to arbitrate" is of "contractual origin." *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 649 (1986) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964)).

As discussed previously, Talk America bore the burden of proving that Douglas received notice of and agreed to the 2005 CSA's arbitration clause. The Ninth Circuit concluded that Talk America failed to meet its burden because posting the terms and conditions of a contract online falls woefully short of fulfilling the standard contract formation requirements of offer and acceptance. (App. 3-6.) Thus, because Talk America failed to establish a contractual duty to arbitrate, the district court could not compel individual arbitration.

2. In Accordance with *Buckeye Check Cashing* and *Prima Paint*, the Ninth Circuit Had the Authority to Resolve Douglas' Challenge to Talk America's Arbitration Clause

Talk America argues that the Ninth Circuit created a "new paradigm" for evaluating arbitration agreements that offends this Court's decisions in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) and *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395 (1967). (Talk America's Petition at 11-12.) Again, an examination of these cases instructs otherwise.

In *Buckeye Check Cashing* and *Prima Paint*, the parties opposing arbitration challenged the validity of the underlying "contract[s] as a whole." *Buckeye Check Cashing*, 546 U.S. at 444; *Prima Paint*, 388 U.S. at 399. In these cases, this Court distinguished between "two types" of "[c]hallenges to the validity of arbitration agreements" under the FAA. *Buckeye Check Cashing*, 546 U.S. at 444. The first type of challenge involves "the validity of the agreement to arbitrate," or the "'making'

of the agreement to arbitrate." *Buckeye Check Cashing*, 546 U.S. at 444; *Prima Paint*, 388 U.S. at 404. The second type of challenge involves the validity of "the contract as a whole." *Id.* A court resolves the first type of challenge; an arbitrator resolves the second. *Id.*

Unlike the parties opposing arbitration in *Buckeye Check Cashing* and *Prima Paint*, Douglas does not dispute (nor has he ever disputed) that he entered into a valid contract with AOL for long distance telephone service in 1998.[10] (*See, e.g.*, ER0092-ER0093 [Douglas' Opposition to Talk America's Motion to Compel Arbitration and Stay Action].) Instead, Douglas opposes the enforcement of the arbitration clause in Talk America's 2005 CSA based upon contract formation principles—*i.e.*, the "'making' of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404. Therefore, because the court (and not the arbitrator) holds the power to determine whether the parties agreed to be bound by an arbitration clause, the Ninth Circuit acted in conformance with this Court's binding authority when

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[10] Douglas' First Amended Complaint reiterates that Douglas entered into a contract for long distance telephone services "[o]n or before July 18, 2005." (ER0011 [First Amended Complaint].) While Talk America scrambles to "make hay" of that statement (*see* Talk America's Petition at 9), the record clearly demonstrates that Douglas actually contracted for long distance telephone services well "*before* July 18, 2005." (ER0011 [First Amended Complaint] (emphasis added).) More specifically, as found by the district court, Douglas "contracted with [AOL] in 1998 for long distance telephone services"—many years prior to the existence of Talk America's online 2005 CSA, which the district court designated as "the agreement containing the arbitration clause." (App. 15, 17.)

it evaluated the arbitration clause contained in Talk America's 2005 CSA and concluded that it was not enforceable against Douglas. *AT&T Technologies, Inc.*, 475 U.S. at 649.

C. The Ninth Circuit's Ruling Did Not Create "A New Paradigm" For The Unconscionability Determination

Talk America argues that the Ninth Circuit's Order requires the parties to "proceed through the 'course of litigation'" before the district court can engage in an unconscionability analysis. (Talk America's Petition at 11 (citing App. 8).) To support its argument, Talk America quotes, in isolation, a statement by the Ninth Circuit that "whether an arbitration clause should be enforced 'depends on facts and circumstances developed during the course of litigation.'" (Talk America's Petition at 5.) In so doing, however, Talk America plainly mischaracterizes the Ninth Circuit's holding.

Douglas asserted the contract defense of unconscionability and, because unconscionability is a state-specific contract defense, the Ninth Circuit utilized California's choice-of-law rules to determine whether New York or California law applied. (App. 6-7 n. 2.) As required by California's choice-of-law analysis, the Ninth Circuit compared California unconscionability law with New York unconscionability law. (App. 6-8.) While so doing, the Ninth Circuit concluded that significant differences exist between the laws of these two states, especially when the arbitration clause at issue contains a class action waiver provision. (*Id.*) Specifically, the Ninth Circuit observed that "[s]uch waivers aren't

substantively unconscionable under New York law;" but, a class action waiver "*may* be unconscionable in California," and "[w]hether it is depends on the facts and circumstances developed during the course of litigation." (App. 8 (citations omitted) (emphasis added).)

When read in context, it becomes patently obvious that the Ninth Circuit's ruling does not require parties to proceed through the entire course of litigation before a court can assess unconscionability, as Talk America would have this Court believe. (*See* Talk America's Petition at 12.) On the contrary, the Ninth Circuit merely repeated generally applicable California contract law, as set forth by the California Supreme Court—namely, that the enforceability of a class action waiver provision, whether it appears in a contract containing an arbitration clause or not, depends upon the circumstances underlying the parties' dispute. *Discover Bank*, 36 Cal.4th at 162-163. For example, a court evaluating a class action waiver provision under California unconscionability law should look at the "facts and circumstances" to determine, among other things, whether "the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages" and whether the party with "superior bargaining power has carried out a scheme to deliberately cheat large amounts of consumers out of individually small sums of money." *Id.*[11]

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[11] Plainly, the "facts and circumstances" upon which unconscionability turns are presented to the court in the parties' briefing on the unconscionability defense.

D. The Ninth Circuit's Decision Regarding Unconscionability And Class Action Waivers Adheres To Precedent

Contrary to Talk America's contention, the Ninth Circuit's finding regarding California's generally applicable unconscionability law did not constitute a "refus[al] to follow this Court's precedent in enforcing an arbitration agreement under 9 U.S.C. § 4 despite the parties' agreement to preclude class actions." (Talk America's Petition at 6 (citing *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).) The explanation for this is simple: the Ninth Circuit based its ruling on 9 U.S.C. § 4's threshold inquiry (that is, whether the parties actually agreed to arbitrate), not on the enforceability of the arbitration clause's class action waiver provision. (App. 3-6.) *See AT&T Technologies, Inc.*, 475 U.S. at 649. In other words, the Ninth Circuit concluded that the 2005 CSA's arbitration clause could not be enforced because Talk America's arbitration clause was not a part of the parties' contract as a matter of law. (App. 3-6.)

Additionally, the Ninth Circuit did not "strik[e] down" the 2005 CSA's arbitration clause because its class action waiver provision "'may be' unconscionable under California law." (Talk America's Petition at 7.) Instead, the Ninth Circuit determined that the district court erred in its unconscionability analysis under California's choice-of-law rules because, *inter alia*, New York and California treat class action waivers drastically differently. (App. 8; *see also* App. 6-7 n. 2.) Specifically, New York law and policy consider the class action device to be merely a waivable procedure. As a result, class

action waiver provisions "aren't substantively unconscionable under New York law." (App. 8 (citations omitted).) In comparison, California law and policy embrace the class action device as a vital tool for consumers to collectively vindicate their substantive legal rights. For this reason, a class action waiver provision "may be unconscionable in California." (App. 8) *See Discover Bank*, 36 Cal.4th at 159, 161 (citations omitted). Therefore, the Ninth Circuit held that the district court "clearly erred" in holding that class action waivers "are consistent with California policy" and "enforceable as a matter of [California] law." (App. 8.)

E. The Ninth Circuit's Correct Application Of California Law Does Not Create A "Split Of Authority"

Talk America also attempts to persuade this Court that the Ninth Circuit's ruling created a so-called "split of authority" on the enforceability of arbitration agreements containing class action waiver provisions. (Talk America's Petition at 5-6.) To support its incorrect position, Talk America lists cases from the Third, Fourth, Fifth, and Eighth Circuits, as well as cases from several state supreme courts, in a footnote string citation.[12] (Talk America's Petition at 6 n.1.) Once again, Talk America's unsupported argument is entirely without merit.

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[12] Notably, this Court recently rejected a petition for writ of certiorari that propounded a similar argument. *Cingular Wireless LLC v. Mendoza*, 126 S.Ct. 2353 (2006).

As a preliminary matter, Congress intended that the FAA "make arbitration agreements as enforceable as other contracts *but not more so.*" *Prima Paint Corp.*, 388 U.S. at 404 n. 12 (emphasis added). Accordingly, a party may oppose an arbitration clause based on any generally applicable contract defense, including unconscionability. *Doctor's Assocs., Inc.*, 517 U.S. at 687. However, the FAA "does not federalize the law of unconscionability or related contract defenses." *Discover Bank*, 36 Cal.4th at 167 (citing *Perry v. Thomas*, 482 U.S. 483, 493 (1987)). Therefore, given the state-specific nature of contract law, Talk America's references to case law from, *inter alia*, Maryland, Texas, and Hawaii (*see* Talk America's Petition at 6 n. 1), are entirely irrelevant to the Ninth Circuit's correct application of generally applicable California contract law[13] to the class action waiver provision embedded in Talk America's 2005 CSA.

Moreover, a close examination of the allegedly contrary circuit court cases cited by Talk America reveals that they are not demonstrative of a "split of authority" because they are completely distinguishable from California law and the issues underlying the Ninth Circuit's Order. For example, the Third Circuit's decision in *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) and the Fifth Circuit's decision in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-175 (5th Cir. 2004) relied upon statutes which

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[13] *See Discover Bank*, 36 Cal.4th at 165-166 (emphasis added) (finding that the principle of unconscionability with respect to class action waiver provisions "applies equally to class action litigation waivers in contracts *without* arbitration agreements as it does to class arbitration waivers in contracts *with* such agreements.")

are not at issue in this case. Specifically, in *Johnson*, the Third Circuit focused on the fact that neither of the putative class' causes of action—namely, the Truth in Lending Act ("the TILA"), 15 U.S.C. § 1601, *et seq.* and the Electronic Fund Transfer Act ("the EFTA"), 15 U.S.C. § 1693, *et seq.*—"confers upon plaintiffs the right to proceed as a class." *Johnson*, 225 F.3d at 369. Similarly, in *Iberia*, the Fifth Circuit found it "highly relevant" that the source of one of the putative class' causes of action—Louisiana's Unfair Trade Practices Act ("the LUTPA")—"does not permit individuals to bring class actions." *Iberia*, 379 F.3d at 174-175.

Unlike the proposed classes in *Iberia* and *Johnson*, Douglas has not filed suit under the LUTPA, the TILA, or the EFTA. Instead, Douglas has sought relief under, *inter alia*, the Federal Communications Act, 47 U.S.C. § 201 ("the FCA") and California's Consumer Legal Remedies Act ("the CLRA"), Cal. Civ. Code § 1750, *et seq.* (ER0012-ER0013 [First Amended Complaint].) In stark contrast to the LUTPA, the TILA, and the EFTA, class actions are permitted under the FCA. Moreover, the CLRA establishes a statutory scheme for consumer class actions in California (Cal. Civ. Code § 1781) and mandates that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ. Code § 1751. These critical statutory distinctions render *Iberia* and *Johnson* wholly inapplicable.

In *Snowden v. CheckPoint Cashing*, 290 F.3d 631 (4th Cir. 2002), the plaintiff—who brought suit under the TILA and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*—argued that the arbitration clause at issue in that case was unenforceable because, absent class action

proceedings, "she [would] be unable to maintain her legal representation given the small amount of her individual damages." *Snowden*, 290 F.3d at 638. The Fourth Circuit rejected this claim because both the TILA and RICO award attorneys' fees to a prevailing plaintiff. *Id.* However, the California Supreme Court has explicitly rejected the notion that "the potential availability of attorney[s'] fees to the prevailing party in arbitration or litigation ameliorates the problem posed by [] class action waivers." *Discover Bank*, 36 Cal.4th at 162. Indeed, in California a class action waiver provision's unconscionability does not hinge upon whether "a plaintiff in arbitration may experience a net loss (including attorneys' fees and costs)," but upon whether the class action waiver provision serves to (among other things) greatly "reduce[] the aggregate liability a company faces when it has exacted small sums from millions of consumers." *Shroyer*, 498 F.3d at 986 (citing *Discover Bank*, 36 Cal.4th at 158-162).

Finally, in *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001), the Eighth Circuit did not even address unconscionability because the party opposing arbitration in that case did not claim that the arbitration clause itself was unconscionable. Instead, the defendants-appellants disputed the viability of the underlying contract as a whole and also asserted that the plaintiffs-appellees had waived their right to arbitration—both of which are questions for the arbitrator to determine. *Id.* (citing *Prima Paint*, 388 U.S. at 403-404; *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 748 (8th Cir. 1986)).

Therefore, the Ninth Circuit's Order does not conflict with the completely inapposite cases cited by Talk America. (Talk America's Petition at 5-6.) Rather, instead of creating a "split of authority," the Ninth Circuit's Order comports with both this Court's binding precedent regarding the FAA and generally applicable California contract law.

III. The Ninth Circuit Remedied The District Court's Misapplications Of Law In Accordance With Fed.R.Civ.P. 52(a) And The *Bauman* Factors

Federal Rule of Civil Procedure 52(a) "broadly requires that [the district court's] findings of fact not be set aside unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). However, "[t]he Rule *does not* apply to conclusions of law." *Id.* (emphasis added). As a result, a reviewing court may "set aside" the district court's conclusions of law if they "rest on an erroneous view of the law." *Id.* In a similar vein, the third dispositive *Bauman* factor authorizes the Ninth Circuit to grant mandamus where "[t]he district court's order is clearly erroneous as a matter of law." (App. 3 (quoting *Bauman*, 557 F.2d at 654-655).)

Here, the district court's determination that Douglas is bound by the online 2005 CSA's arbitration clause, class action waiver provision, and New York choice-of-law clause constitutes a conclusion of law. *Buckeye Check Cashing*, 546 U.S. at 444 (holding that the "'making' of the agreement to arbitrate" is a question of law for the court to determine); *see also First Options of Chicago, Inc.*, 514 U.S. at 947-948. Therefore, the Ninth Circuit

has authority to reject this determination if it resulted from a misapplication of the law. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

Talk America claims that the Ninth Circuit "misus[ed] the office of mandamus" and "attempted to make findings of fact as to the existence and terms of a written contract not before the district court." (Talk America's Petition at 13.) But, Talk America misstates the law and the facts. *First*, the Ninth Circuit did not interpret or enforce the terms of any pre-2005 CSA. Rather, as discussed more fully below, the Ninth Circuit simply determined whether Douglas could properly be bound by Talk America's 2005 CSA under generally applicable contract principles. (*Compare* Talk America's Petition at 13; App. 4-6.) *Second*, the district court's factual findings—as well as common sense—dictate that Talk America's 2005 CSA represents a "change" from Douglas' 1998 contract with AOL. Talk America's 2005 CSA did not even exist when Douglas entered into his contract with AOL (an entirely different corporation) for long distance telephone services in 1998. (*See* App. 15.) Furthermore, the district court identified the online 2005 CSA—not AOL's 1998 CSA or any other pre-2005 CSA—"as the agreement containing the arbitration clause." (App. 17.)

A. The District Court Erred In The Application Of Fundamental Contract Law

In this case, the Ninth Circuit properly exercised its mandamus authority because the district court's legal conclusion regarding the enforceability of the three provisions in Talk America's 2005 CSA "rest[s] on an

erroneous view of [contract] law." *Pullman-Standard*, 456 U.S. at 287; *see also Bauman*, 557 F.2d at 654-655. To illustrate with respect to the arbitration clause, the district court made the following pertinent findings of fact: (1) Douglas contracted with AOL for long distance services in 1998 (App. 15); (2) Talk America "under[took] the obligation to provide those services in 2001" (App. 20); (3) Talk America's online 2005 CSA was "the agreement containing the arbitration clause" (App. 17); (4) this arbitration clause sought to both "waiv[e] [Douglas'] right to pursue claims on behalf of a class" and "require[] [Douglas] to pursue his claims in arbitration" (App. 16-17); (5) Talk America never alerted Douglas regarding the 2005 CSA's arbitration clause (App. 17); and (6) Talk America's website "contained a link to the [2005] CSA" (App. 20). Based upon these *findings of fact*, the district court concluded *as a matter of law* that Douglas was bound by the 2005 CSA's arbitration clause because—according to the district court's interpretation of contract law—posting contractual terms and conditions on a website, without more, is sufficient to establish a consumer's agreement to those terms and conditions. (App. 20.)

Upon review of Douglas' petition for writ of mandamus, the Ninth Circuit concluded *as a matter of law*, based upon *the district court's findings of fact* (*i.e.*, that Talk America did not inform Douglas about the existence or availability of its online 2005 CSA), that the 2005 CSA's arbitration clause could not be enforced against Douglas because Talk America could not satisfy fundamental notice and assent requirements. The Ninth Circuit reasoned that even the cases "on which the district court relied" instruct that the service provider

must provide written notice of contractual terms and conditions before a court can infer acceptance of those terms. (App. 5 (referencing *Crawford v. Talk America, Inc.*, No. 05-CV-0180-DRH, 2005 WL 2465909, at *4 (S.D. Ill. Oct. 6, 2005); *Bischoff v. DirecTV, Inc.*, 180 F.Supp.2d 1097, 1103-1106 (C.D. Cal. 2002)).)[14]

Talk America attempts to dismiss the district court's factual finding that Douglas was not notified of the arbitration agreement, and asserts that the district court "properly found the issue was not controlling." (Talk America's Petition at 14 n. 5.) However, as explained by the Ninth Circuit, parties to a contract do not have any legal obligation to seek out and review a contract's terms where the drafting party has provided no notice regarding the existence of these terms. (App. 6.) In essence, the Ninth Circuit remedied the district court's erroneous conclusion of law by finding that it is not enough that Douglas "*could* have read" the 2005 CSA on Talk America's website (App. 20 (emphasis added)), especially when Talk America gave Douglas "no reason to look at the contract posted there." (App. 6.)

B. The District Court Committed "Two Additional Errors" Of Law

In addition to its "fundamental misapplications of contract law" (App. 6), the district court "also committed two additional errors" of law which resulted from the

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[14] The Ninth Circuit also found these cases to be distinguishable because they "involved new customers who necessarily would be on notice that they were required to assent to contract terms as a predicate for using the service." (App. 5.)

district court's misapplication of California's choice-of-law rules. (App. 6; *see also* App. 6 n. 2.) Specifically, the "district court erred in analyzing California law as to both procedural and substantive unconscionability" (App. 7). *See also* Fed.R.Civ.P. 52(a).

First, the district court erred in holding that the 2005 CSA's arbitration clause containing a class action waiver provision "is not procedurally unconscionable (and therefore enforceable [under California law]) because Douglas had meaningful alternative choices for telephone service." (App. 7.) This conclusion of law is erroneous because:

> [i]n California, a contract can be procedurally unconscionable if a service provider has overwhelming bargaining power and presents a "take-it-or-leave-it" contract to a customer—even if the customer has meaningful choice as to service providers.

(App. 8 (citation omitted).)

Second, the district court erred in holding that the 2005 CSA's class action waiver provision "is not substantively unconscionable" under California law. This conclusion is erroneous because it directly conflicts with deep-seated California law and policy. Indeed, while "New York courts have consistently held that [class action waivers] are not unconscionable and do not violate public policy," California courts "have not hesitated to invalidate class action waivers in the appropriate circumstances." (App. 8, 24.) *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 1293 (Cal.Ct.App. 2005).

Accordingly, because the Ninth Circuit's ruling corrected the district court's three clear errors of law in conformity with Federal Rule of Civil Procedure 52(a) and the third *Bauman* factor, the Ninth Circuit properly invoked its mandamus power.

IV. The Ninth Circuit Correctly Concluded That An Individual Arbitration Proceeding Would Render Douglas' Class Action Claims Moot And Unappealable

The law is clear: a named plaintiff must have a "personal stake in the substantive controversy" in order to represent the collective interests of a putative class—particularly where the case has not yet reached the class certification stage of litigation. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). The reasoning underlying this requirement is that a litigant's right to "employ Rule 23" is procedural in nature, and "ancillary to the litigation of substantive claims." *Id.* If a plaintiff's "substantive claims become moot in the [Article III][15] sense, by settlement of all personal claims for example," a federal court must dismiss the plaintiff's case for lack of jurisdiction. *Id.* Accordingly, the Ninth Circuit correctly determined that, if Douglas were forced to proceed with individual arbitration and if the arbitration award fully satisfied Douglas' individual claim, then Douglas would lose both "his status as a class representative" and his opportunity to appeal the district

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[15] Article III, § 2 of the United States Constitution limits federal court jurisdiction to "Cases" and "Controversies." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980).

court's erroneous order "because he would no longer have a concrete stake in the controversy." (App. 10.) This highly prejudicial result "weigh[ed] in favor of granting mandamus relief" under the first and second *Bauman* factors. (App. 9.)

Talk America wrongly disputes the Ninth Circuit's conclusion and argues that Douglas could directly appeal the district court's erroneous order after the conclusion of his individual arbitration. (Talk America's Petition at 14-15.) Talk America bases its argument on this Court's seminal decisions in *Geraghty* and *Roper*. However, Talk America's argument falls flat because *Geraghty* and *Roper* extend only to a putative class representative's procedural right to *directly appeal the denial of class certification* after his/her claims have been satisfied. Specifically, in *Geraghty*, this Court held that the "mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot." 445 U.S. at 397 (referencing *Sosna v. Iowa*, 419 U.S. 393, 400 (1975)) (emphasis in original); *see also Geraghty*, 445 U.S. at 404 (stating that "[o]ur holding is limited to the appeal of the denial of the class certification motion"). Likewise, in *Roper*, this Court's holding centered on the named plaintiffs' procedural right to appeal the district court's denial of class certification once their substantive claims had expired. *Roper*, 445 U.S. at 335-338.

Unlike the proposed class representatives in *Geraghty* and *Roper*, Douglas' case has not proceeded to the class certification stage of litigation. In fact, Talk America responded to Douglas' First Amended Complaint by swiftly filing its motion to compel

individual arbitration and stay the litigation. (ER001-ER0026 [First Amended Complaint]; ERER0027-ER0048 [Points & Authorities in Support of Talk America's Motion to Compel Arbitration].) Thus, given the procedural posture of Douglas' class action lawsuit against Talk America, neither *Geraghty* nor *Roper* could rescue Douglas' case from dismissal based upon mootness if Douglas proceeds to arbitration and is awarded his full measure of damages.

Moreover, rather than weaken the Ninth Circuit's holding, *Geraghty* and *Roper* buttress the Ninth Circuit's determination that mootness principles would prevent Douglas from directly appealing the district court's erroneous order. Under both *Geraghty* and *Roper*, a putative class representative's case becomes moot "by settlement of all [his/her] personal claims" prior to the class certification stage. *Roper*, 445 U.S. at 332; *see also Geraghty*, 445 U.S. at 396. As a result, if Douglas proceeds to individual arbitration (as ordered by the district court) and "is awarded all the damages he asks for," his "individual claim"—*i.e.*, his substantive controversy—"would be rendered moot." (App. 9.) This "definitive mootness" would "oust[] the jurisdiction of the federal courts" and require "dismissal of [Douglas'] case." *Roper*, 445 U.S. at 335.

In sum, the favorable resolution of Douglas' small value claims through compulsory individual arbitration would rob Douglas of his "status as class representative" and would deprive him of the "opportunity to challenge the district court's order compelling the arbitration in the first place." (App. 10.) Therefore, the Ninth Circuit properly concluded that the first and second *Bauman*

factors favored granting Douglas' petition for extraordinary relief because the mootness of Douglas' claims would plainly "'prejudice' Douglas 'in a way not correctable on appeal.'"[16] (App. 9 (quoting *Bauman*, 557 F.2d at 654).)

CONCLUSION

Talk America has not established that any compelling grounds exist for this Court to grant its Petition. For the reasons explained herein, the Ninth Circuit properly exercised its mandamus authority to remedy the district court's significant errors of law, and the Ninth Circuit did so in accordance with well-established and generally applicable law. Therefore, Douglas respectfully requests that this Court deny Talk America's Petition in its entirety.

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[16] Talk America also repeats its unfounded argument that the Ninth Circuit's mootness analysis—in concert with its use of the *Bauman* factors—stands in conflict with "the decisions of other courts of appeal." (Talk America's Petition at 15.) However, as set forth above, the Ninth Circuit's standard of review for mandamus petitions under the All Writs Act, 28 U.S.C. § 1651, not only matches the standard used in other circuits, but also complies with this Court's precedent.

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